

Response to:

Request for Comment on Whether EPA's Approval of a Clean Water Act Section 404 Program Is Non-Discretionary for Purposes of Endangered Species Act Section 7 Consultation

Date submitted:

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Submitted by:

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Text:

On May 21, 2020, the EPA submitted a notice in the Federal Register, requesting comment on "whether the EPA should reconsider its current position that consultation under Endangered Species Act (ESA) section 7 is not required when the EPA approves a state or tribe's request to assume the Clean Water Act (CWA) section 404 dredged and fill permit program under the CWA." 85 Fed. Reg. 30953.

The EPA has an obligation to request consultation under ESA section 7 when considering a state or tribe's request to assume the section 404 program. The EPA should reconsider its current position, which is at odds with US Supreme Court precedent governing section 7 consultation.

Section 7(a)(2) of the ESA provides that federal agencies "shall, in consultation with" the United States Fish and Wildlife Service (USFWS) and National Oceanic and Atmospheric Administration (NOAA) insure that agency actions do not jeopardize the continued existence of threatened or endangered species or destroy or adversely modify critical habitat.

This requirement has the potential to conflict with other federal statutes that may require an agency to act without explicitly allowing the agency to comply with Section 7(a)(2). The Supreme Court addressed this issue in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). The Court held that Section 7(a)(2) continues to apply if the affected federal agency has discretion under the

allegedly conflicting federal statute to give “effect to the ESA’ no-jeopardy mandate” as expressed in Section 7(a)(2). If the federal agency does not have this discretion, Section 7(a)(2), including the consultation requirement, does not apply.

In *National Association of Home Builders*, the Court was specifically considering Section 402 of the CWA. Under that section, EPA *must* delegate the 402 program if a state application complies with the listed factors, which do not include the ability to give “effect to the ESA’s no-jeopardy mandate.” Requiring consultation would have effectively added a factor to the statute, thus creating a conflict between CWA Section 402 and ESA Section 7(a)(2).

In 2010, following the *National Association of Home Builders* decision, the EPA issued a letter concluding that Section 7 consultation does not apply to a Section 404 assumption determination. This remains EPA’s position with respect to section 404.

The reasoning in the 2010 letter is flawed. Section 7(a)(2) applies to the EPA’s determination of whether to allow state assumption of the 404 program because the section 404 provides the EPA discretion to give “effect to the ESA’ no-jeopardy mandate.” In determining whether to allow a state to assume the 404 program, the EPA must determine whether the state possesses the authority to assure that state-issued permits comply with the 404(b)(1) guidelines. The 404(b)(1) guidelines incorporate the ESA Section 7(a)(2) standard, by providing that no permit shall issue if it is likely to jeopardize the continued existence of a threatened or endangered species, or destroy or adversely modify critical habitat. Not only does the EPA possess the discretion to give “effect to the ESA’s no-jeopardy mandate,” by providing the EPA with broad authority to establish guidelines under Section 404(b)(1) and then requiring that compliance with these guidelines be a requirement of 404 assumption, the EPA has in fact availed itself of that discretion to adopt a guideline equivalent to Section 7(a)(2).

The EPA’s 2010 letter errs because it considers only whether the EPA has the discretion to add to the list of criteria in Section 404(h). If a state meets the criteria in Section 404(h), the EPA *must* approve assumption. *This* decision is not discretionary. However, as stated above, the EPA *does* have discretion over the content of its 404(b)(1) guidelines, including the ability to give “effect to the ESA’s no-jeopardy mandate,” and compliance with these guidelines is one of the criteria of Section 404(h).

This reasoning is described in greater detail in a document submitted to the EPA as part of the EPA’s request for comment by the Florida Department of Environmental Protection, which is titled “EPA Approval of State Assumption of Clean Water Act Section 404 Program: Streamlined Approach to Address Endangered Species Act Incidental Take Coverage.” Oregon incorporates Sections I.B. and I.C. of this document by reference.